2001

Sean Porter v. Natalie Street Porter : Brief of Appellee

Utah Court of Appeals

Christina Miller; Tesch, Vance and Miller; Attorney for Appellee.
Franklin Richard Brussow; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

SEAN PORTER,	*	
Petitioner-Appellant,	*	Case No. 20010179-CA
v.	*	
NATALIE STREETER PORTER,	*	Priority No. 15
Respondent-Appellee.	*	

APPELLEE'S BRIEF

Appeal from a Judgment of the
Third Judicial District Court for Summit County
The Honorable Leon A. Dever, Judge

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

Sean Porter appeals from a final decree of divorce entered by the trial court. This Court has jurisdiction under UTAH CODE ANN. § 78-2a-3(2)(h) (Supp. 2001).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Mr. Porter presents essentially two issues for review:

1. Did the trial court abuse its discretion in distributing property to the parties?

2. Did the trial court abuse its discretion in denying alimony to Mr. Porter?

Standard of Review: "'Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.'" *Bradford v. Bradford*, 1999 UT App 373, ¶ 12, 993 P.2d 887 (quoting *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991)).

STATEMENT OF THE CASE

Sean Porter filed for divorce from his wife, Natalie Streeter Porter. After a trial on November 30 and December 1, 2000, the trial court entered Findings of Fact and Conclusions of Law concerning the questions of alimony and division of property. (R. 449-59, Aple.'s Br. Addendum at 1-10). Thereafter, the court entered a Decree of Divorce, which denied alimony to Mr. Porter and distributed various properties to the parties. (R. 461-69, Aplt.'s Br. Addendum at 3-11). Mr.

Porter now appeals from that decree, challenging the trial court's decisions on alimony and the division of property.

STATEMENT OF FACTS

Given the nature of this brief's responses to Mr. Porter's opening brief, no statement of facts is necessary. For reasons that will become obvious below, the absence of a statement of facts should not be construed as signifying that Ms. Streeter[1] agrees with Mr. Porter's statement of facts. She does not.

SUMMARY OF ARGUMENT

Because Mr. Porter's appellate presentation of his case is deficient in several significant respects, this Court should not address the merits of any of his arguments. First, Mr. Porter's challenges to the trial court's decision are not supported by either an adequate record on appeal or proper citations to the record – clear violations of basic rules of appellate procedure.

Second, Mr. Porter has not complied with the well-established "marshaling requirement" in attacking the trial court's findings. Rather, he argues only those "facts" that are favorable to his position – something this Court has repeatedly condemned.

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[1] The divorce decree restored to appellee the use of her maiden name: Natalie T. Streeter. Accordingly, this brief refers to her as "Ms. Streeter."

Finally, Mr. Porter's overall analysis of the issues he presents for review is so lacking that it effectively shifts to this Court the burden of developing a cogent analysis of the facts and the law. As the Court has said many times, it will not take on that burden; the appellant must provide briefing that adequately sets forth the legal analysis relevant to the specific facts of the case and that directs the Court to the specific errors the appellant claims the lower court committed.

In sum, the foregoing deficiencies in Mr. Porter's opening brief, viewed singly or together, are clear grounds for summary affirmance of the trial court's judgment. That is precisely the course this Court has taken in numerous other cases with similar deficiencies in the appellant's briefing, and it should not hesitate to resolve this appeal in the same manner.

ARGUMENT

A. Introduction

In his brief, Mr. Porter presents seven arguments attacking the trial court's denial of alimony to him and its decisions concerning the distribution of property. Aplt.'s Br. 15-26. Ms. Streeter's brief, however, will not address the merits of any of those arguments. As explained below, numerous deficiencies in the record provided by Mr. Porter for this appeal and in his brief preclude consideration of his assignments of error.

B. This Court should not consider Mr. Porter's challenges to the trial court's judgment because his appellate arguments are not supported by an adequate record or proper citations to the record.

As foundation for Mr. Porter's claims that the trial court erred in denying him alimony and in dividing property between the parties, he sets forth in his brief an extensive "Statement of Facts," which is supported only by occasional references to various trial exhibits. Aplt.'s Br. 3-9. Many of those exhibits, however, do not support the factual assertions to which their citation is attached. Moreover, the majority of Mr. Porter's "facts" are not supported by any citation to the record. Noticeably absent are any citations to a transcript of the two-day trial, which Mr. Porter has not provided for this Court's review (having not had one prepared). The same is true with respect to the assertions of "fact" and references to "testimony" that appear in the "Discussion" section of Mr. Porter's brief. Aplt.'s Br. 15-26.

It is well settled that an appellant who attacks the findings of the trial court, as Mr. Porter does here, must (1) "provide this [C]ourt with *all evidence* relevant to the issues raised on appeal,'" *Sampson v. Richins*, 770 P.2d 998, 1002 (Utah Ct. App. 1989), and (2) must "make a 'concise statement of [relevant] facts and citation of the pages in the record where those facts are supported." *Phillips v. Hatfield*, 904 P.2d 1108, 1109 (Utah Ct. App. 1995) (quoting *Koulis v. Standard*

Oil Co., 746 P.2d 1182, 1184 (Utah Ct. App. 1987)). Mr. Porter has not complied with either of those requirements.

It is equally clear that "this [C]ourt will not consider any facts not properly cited to, or supported by, the record. *Phillips*, 904 P.2d at 1109. As noted above, no record citation whatsoever accompanies many of the "facts" Mr. Porter asserts in his brief.

Accordingly, given Mr. Porter's failure to provide an adequate record on appeal and to make proper citations to the record in his brief, this Court should assume the correctness of the trial court's judgment. *See State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213, 216 (Utah Ct. App. 1990) ("Since counsel failed to provide this court with all relevant evidence bearing on the issues raised on appeal, as required by Utah R. App. P. 11(e)(2), we can only presume that the judgment was supported by sufficient evidence." (citation omitted)); *Phillips*, 904 P.2d at 1109 ("This court will assume the correctness of the judgment below if the appellant fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported." (internal quotation marks omitted)).

C. Mr. Porter's failure to comply with the "marshaling requirement" is an additional basis upon which this Court should not consider his attacks on the trial court's judgment.

Although Mr. Porter never cites any of the findings the trial court made with respect to alimony and the division of property, *see* Decree of Divorce (R. 461-69, Aplt.'s Br. Addendum at 3-11) and Findings of Fact, Conclusions of Law (R. 449-59, Aple.'s Br. Addendum at 1-10), his arguments for reversal necessarily attack those findings. In that regard, he fails to summarize the evidence that supports those findings or to demonstrate the insufficiency of that evidence, as he is obligated to do under the well-established "marshaling requirement."

As this Court has stated on numerous occasions:

> On appeal, it is the burden of the party seeking to overturn the trial court's decision to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Hagan v. Hagan, 810 P.2d 478, 481 (Utah Ct. App. 1991) (citations omitted). Indeed, "[t]he marshaling requirement is a prerequisite to [this Court's] examination of the finding[s]." *Wilde v. Wilde*, 2001 UT App 318, ¶ 29, ___ P.2d ___. And, "[i]f the appellant fails to marshal the evidence, the appellate court assumes the record supports the finding[s] of the trial court." *Ibid.* (internal quotation marks omitted; second brackets in original).

Mr. Porter does not even pretend to satisfy the marshaling requirement. He simply presents only those "facts" that support his side of the argument, completely avoiding his obligation to "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings [he] resists" and then, "[a]fter constructing this magnificent array of supporting evidence, * * * [to] ferret out a fatal flaw in the evidence." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (explaining marshaling requirement). Accordingly, this Court should assume the trial court's findings are supported by the evidence and affirm its decisions concerning alimony and property division.

D. Mr. Porter's failure to provide adequate briefing provides yet another basis on which this Court should decline to address his assignments of error.

In the "Discussion" section of his brief, Mr. Porter – for all practical purposes – presents no cogent legal analysis to support his claims of error. It is well settled that "[b]riefs must contain reasoned analysis based upon relevant authority." *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14 (citing Utah R. App. P. 24). "An issue is inadequately briefed when 'the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" *Ibid.* (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)). All of the arguments contained in Mr. Porter's "Discussion" suffer from that defect.

There is no effort to apply – in any structured or understandable way – the relevant legal principles to the facts or, more importantly, to direct this Court to the specific findings by the trial court that Mr. Porter contends are wrong and demonstrate how the court abused its discretion. Therefore, an additional ground for this Court's affirmance of the trial court's judgment without reaching the merits of Mr. Porter's appellate arguments is that his briefing is wholly inadequate. *See Smith*, 1999 UT App 370, ¶ 17 ("Because of the inadequacy of Appellant's brief, we affirm the judgment below.").

CONCLUSION

Based on the foregoing arguments, this Court should summarily affirm the trial court's judgment.

DATED this 29th day of October 2001.

Respectfully submitted,

David B. Thompson

DAVID B. THOMPSON
CHRISTINA I. MILLER

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that on October 29, 2001, the foregoing Appellee's Brief was served on Franklin Richard Brussow, attorney for appellant, by mailing him two copies, postage prepaid, and that the required number of briefs were mailed to the Utah Court of Appeals by first class mail, postage prepaid, in envelopes addressed to:

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ADDENDUM

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

SEAN PORTER, Petitioner, v. NATALIE STREETER PORTER, Respondent.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 994600017 Judge L. A. Dever

This matter came on for trial before the Honorable L.A. Dever, on November 30, 2000 and December 1, 2000. Petitioner was present and was represented by counsel, Franklin Richard Brussow. Respondent was present and was represented by counsel, Christina Inge Miller and Jeffery D. Salberg. The Court, having heard the testimony provided by the parties and other

witnesses, having heard the proffers of counsel, having reviewed the pleadings on file herein, and being fully informed, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Petitioner and respondent are bona fide and actual residents of Summit County, State of Utah, and have been for a period in excess of three months prior to the commencement of this action.

2. Petitioner and respondent are husband and wife, respectively, having been married on October 12, 1996.

3. The parties have experienced difficulties in their relationship, which have become and are irreconcilable and which make the continuation of the marriage under the circumstances impossible.

4. There have been no children born issue of this marriage, and none are expected.

5. Respondent should be restored the use of her maiden name, to wit: Streeter.

ALIMONY

6. Petitioner has not established a need for alimony. His financial condition as of February 1999, the end of the parties' relationship, was better than it had been prior to the marriage. When petitioner received a substantial gift from respondent's parents in the Spring of 1999, instead of paying bills, petitioner gave approximately $10,000 to his sister and mother. His income after separation was greater than that before or during the marriage. Petitioner claims he left his employment because of the stress of the divorce rather than being fired. There is no corroboration of this claim. In fact, petitioner's testimony was that he had been fired from a job prior to the

marriage. Petitioner also testified that he has not seriously looked for a job and has been waiting for the divorce to become final. Petitioner is a professional and is capable of earning a good income. Petitioner has no extraordinary expenses and is living the same as he did prior to moving in with respondent. Presently respondent has no income other than income received from her trust. Petitioner's claim that respondent should get a job and pay him alimony is without merit. The length of the marriage was approximately four years total. Accordingly, petitioner's claim for alimony should be denied.

DIVISION OF PROPERTY

Petitioner, under oath, stated, and his counsel later stipulated, that petitioner is entitled to one-half of the appreciation of the properties in question. Petitioner stated, and his counsel later stipulated, that respondent is entitled to be reimbursed for any trust monies not commingled.

Respondent's Pre-Marital Property

7. **Empire Avenue Property**: The Empire Avenue property is a pre-marital, separate asset of respondent. The appraised value of the property prior to the marriage was $310,000. As of the date of trial, the property is valued at $268,000. The property has not appreciated in value. Petitioner has made no payments on the house, except three payments to a later mortgage secured by the house, and has made only minor repairs while living in the house. The taxes have always been paid by respondent's trust funds. Accordingly, petitioner's claim for any interest in the Empire Avenue property should be denied and the Empire Avenue property, together with any indebtedness, should be awarded to respondent as her sole and separate property.

8. **6.18 Acres and 5 Water Shares**: The 6.18 acres and 5 water shares is a pre-marital, separate asset of respondent. The appraised value of the property in 1994 was $365,000. In the year 2000, the appraised value of the property is $435,000. The property was purchased with respondent's trust funds. All taxes were paid by respondent. Some improvements were made to the house and the barn (i.e., new roof, new floors, new bath, new paint) and all materials were paid by respondent. Petitioner, along with respondent and others, were involved with some labor aspects of some improvements. However, there has been no evidence as to the value (enhancement) of the material or the labor involved on this property. Accordingly, petitioner's claim for an interest in this property should be denied and the 6.18 acres and 5 accompanying water shares, together with any indebtedness, should be awarded to respondent as her sole and separate property.

9. **Overhang Property**: During the marriage, respondent acquired shares in a family vacation home in Isle Au Haut, Maine. Petitioner stated under oath that he was given $3,333.34 by respondent's father to purchase shares and to give those shares to respondent. Petitioner stated that he complied with this request from Mr. Streeter by depositing the gift and providing the money to respondent. Petitioner has no interest in those shares or any viable claim for an interest therein. Accordingly, petitioner's claim for an interest in the Overhang Property should be denied and any interest in the Overhand Property, together with any indebtedness, should be awarded to respondent as her sole and separate property.

10. **4.77 Acres and 4½ Water Shares**: The 4.77 acres and 4½ water shares is a pre-marital, separate asset of respondent. The property was purchased in 1996 for $210,883. The

value at the time of trial is $170,000. The property has not appreciated in value. The property was purchased by refinancing of the Empire Avenue home. The taxes have been paid by respondent. Petitioner stated that the only work he did on this property was to fix the fence and clean the property. He also stated that he made three payments on the mortgage on this property of $1,668.55 each, plus additional assessments. The issue of petitioner's payments is addressed in paragraph 21 below. Accordingly, petitioner's claim for an interest in this property should be denied and the 4.77 acres and 4½ accompanying water shares, together with any indebtedness, should be awarded to respondent as her sole and separate property.

11. **19.03 Acres – Allegheny Property**: The 19.03 acres of Allegheny property is a pre-marital, separate asset of respondent. The property was purchased by respondent in July 1996 with her trust funds for $66,000. Petitioner stated that the purpose behind the purchase of this property was to sell the lumber and to split the profits. Respondent has not disputed this claim. The parties received $65,500 for the timber on the property. Therefore, all of the funds expended by respondent for the purchase of this property have been returned. Accordingly, this property should be immediately listed for sale and sold and the proceeds derived therefrom, after paying all expenses, should be split equally between the parties.

12. **37.82 Acres and 38 Water Shares**: The 37.82 acres and 38 water shares are a pre-marital, separate asset of respondent. The down payment was paid by respondent's trust funds and profit from Deer Valley property, which was purchased by the parties. The Deer Valley property was a $240,000 investment, $211,000 from respondent's trust funds and $29,000 from petitioner in the form of a twelve percent (12%) discount from the seller. There is a

disagreement as to the percentage of ownership in the Deer Valley property as a result of this investment procedure. Petitioner claims 50/50 and respondent claims 60/40. However, the property was titled jointly and will therefore be considered a 50/50 relationship. Petitioner is requesting one-half of the appreciated value of this property. The property was purchased for $960,000 in February of 1996 and has a present value of $900,000. There has been no appreciation. Petitioner's claim for an interest in this property should be denied. Furthermore, since petitioner's claim is only for one-half of the appreciation, the property should be awarded to respondent as her sole and separate property, subject to its indebtedness.

Post-Marital Property

13. **100 Acres, Boulder, Utah**: The Boulder property was purchased in December 1996. Respondent stated that she felt obligated to put the property in joint tenancy because she was put on the spot at the closing and she determined that because she did not have a Will, joint tenancy would keep the property out of probate. The property was purchased for $750,000. Respondent put $200,000 down from her trust funds and has paid four payments of $62,765 from her trust funds on a 20-year note. Petitioner has paid $500 for crop spraying and may have paid $625 for part of the hay. Neither of these payments has enhanced the value of the land. Petitioner stated that he graded a road. The testimony of Mr. Muse was that the type of grading done by petitioner only lasts for approximately 4 months due to the nature of the soil. The current value of the land does not exceed the payments made and the remaining mortgage. Respondent has paid all of the taxes from her trust funds. Accordingly, petitioner's claim for an

interest in the Boulder property should be denied and the Boulder property should be awarded to respondent as her sole and separate property, subject to the outstanding indebtedness.

14. **Silver Springs, Nevada**: Respondent purchased the Silver Springs, Nevada property for $30,186 in June of 1997. Respondent purchased the property with her trust funds. Petitioner testified that the purchase of the house was a business deal between respondent and his father. Petitioner made no claims that he was involved in said business deal. Respondent has paid all of the taxes from her trust funds. Petitioner has admitted that he has done nothing to enhance the value of the property. Accordingly, petitioner's claim for an interest in the Silver Springs property should be denied and the property, together with any indebtedness, should be awarded to respondent as her sole and separate property.

15. **1 Share of Midway Irrigation Water**: Respondent purchased the water share with her trust funds. Petitioner testified that he had no knowledge of the purchase and has made no claim on it. Accordingly, petitioner's claim for an interest in the 1 share of Midway Irrigation should be denied and the 1 share should be awarded to respondent as her sole and separate property.

16. **4 Shares of Midway Irrigation Water**: The parties purchased 4 shares of Midway Irrigation water for $15,000 per share in 1998. The present value is still $15,000 per share. Each party paid $6,000 as a down payment. Respondent has made the first of six annual payments of $10,700 from her trust funds. It is appropriate that respondent be ordered to pay to petitioner the amount of $6,000 representing his down payment for the water shares. Upon

payment of the $6,000 to petitioner, the water shares should be awarded to respondent, as her sole and separate property, with no claim by petitioner.

17. **Midway Equestrian Center**: The parties formed a partnership known as the Midway Equestrian Center. Much of the labor that was done on all the property was to benefit this partnership; however, Midway Equestrian Center does not own the real property. Midway Equestrian Center does have personal property valued at approximately $22,000, plus a backhoe valued at $36,020. Respondent has incurred debt and expenses in the approximate amount of $250,000 against the partnership. Accordingly, it is appropriate that the Midway Equestrian Center business, together with its indebtedness, be awarded to respondent as her sole and separate property, free and clear of any claim by petitioner.

Miscellaneous Provisions:

18. **Timp's Shadow**: Timp's Shadow was an asset of the Midway Equestrian Center and its value was consumed by that partnership.

19. **Backhoe**: The backhoe residual was paid off by petitioner with funds received from respondent's mother, which were sent, at respondent's request, for the purpose of paying off the backhoe. The backhoe has been included in the value of the partnership and should therefore be awarded to respondent as her sole and separate property. Accordingly, petitioner's claim for an interest in the backhoe should be denied.

20. **Dodge Truck**: The Dodge Truck was a leased vehicle. Respondent made all of the monthly payments with her trust funds. The residual was paid off by respondent with her trust funds in October 2000. Accordingly, petitioner's claim for an interest in the Dodge Truck

should be denied and the Dodge Truck should be awarded to respondent as her sole and separate property, together with any indebtedness.

21. **Refinance**: Respondent had to pay $5,409 in fees because of petitioner's failure to cooperate in the refinance of the 37.82 acres. Petitioner, therefore, owes respondent $5,409. However, petitioner should receive credit for the mortgages and assessments he paid on the Empire mortgage as set forth in paragraph 10 above. Accordingly, respondent should pay to petitioner the sum of $296.

22. **Income Tax Refund**: Respondent should be directed to have her accountant calculate each party's 1998 tax refund/obligation for filing separate 1998 tax returns. If respondent is entitled to a larger refund because she filed a joint return with petitioner, respondent should be ordered to pay to petitioner one-half of the difference of the refund she will receive by filing the joint return versus the refund she would receive by filing a separate return.

The parties should be ordered to immediately execute the 1999 joint income tax returns as soon as the same are available.

23. **Attorneys Fees**: Each party is capable of paying their own attorney's fees and costs incurred herein and should be ordered to pay the same.

CONCLUSIONS OF LAW

In accordance with the aforementioned Findings of Fact, the Court has reached the following Conclusions of Law:

1. This Court has subject matter and personal jurisdiction over this case and the parties to this case. Venue is properly in this Court.

2. Petitioner is entitled to a divorce based on the grounds that irreconcilable differences have arisen during the course of the marriage, making its continuation impossible.

3. It is reasonable and proper that the parties' assets, debts and liabilities be distributed in accordance with the above Findings of Fact.

4. It is reasonable and proper for a Decree of Divorce to be issued that is consistent with the Findings of Fact in all regards.

DATED this 26 day of January, 2001.

BY THE COURT:

The Honorable L. A. Dever
Third District Court Judge

By _____
STAMP USED AT DIRECTION OF JUDGE

NOTICE PURSUANT TO RULE 4-504 OF THE RULES OF JUDICIAL ADMINISTRATION OF THE STATE OF UTAH

To the Petitioner, SEAN PORTER, and his counsel, FRANKLIN RICHARD BRUSSOW:

NOTICE IS HEREBY GIVEN, pursuant to Rule 4-504 of the Rules of Judicial Administration of the District Courts of the State of Utah, that these Findings of Fact and Conclusions of Law prepared by respondent shall be the Order of the Court unless you file an objection in writing within five (5) days from the date of the service of this notice.

DATED this 8 day of January, 2001.

TESCH, VANCE & MILLER, LLC

Christina Inge Miller
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of January, 2001, I mailed, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing to:

Franklin Richard Brussow
P.O. Box 71705
Salt Lake City, Utah 84171